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JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1956

SOUTHLAND BROADCASTING COMPANY, LESTER KAMIN, BILLY B. GOLDBERG and PAT COON,
Petitioners,

v.

REX F. TODD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Southland Broadcasting Company, Lester Kamin, Billy B. Goldberg and Pat Coon, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on March 20, 1956, which reversed and remanded a judgment of the United States District Court for the Southern District of Texas sustaining petitioners' motion for judgment at the close of respondent's (plaintiff's) evidence.

OPINIONS BELOW

The United States District Court for the Southern District of Texas did not deliver a written opinion, but it made complete findings of fact and conclusions of law (R. 669-689). The opinion of the Court of Appeals is reported at 231 F. 2d 225, and a copy thereof is appended to this petition (Appendix A).

JURISDICTION

The date of the judgment or decree sought to be reviewed, and the time of its entry, is March 20, 1956 (Appendix B). Petitioners timely filed a motion for rehearing, which was overruled by the Court of Appeals on April 30, 1956 (Appendix C). Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 U. S. C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Whether the Court of Appeals has denied petitioners due process of law by depriving them of the opportunity of presenting their evidence to the trial court.

2. Whether the Court of Appeals has erred in holding to be clearly erroneous the finding of the trial court that petitioners Kamin, Goldberg and Coon were the beneficial owners of Radio Station KCIJ.

STATUTES AND REGULATIONS INVOLVED

There are no statutes or regulations involved in this case.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance is diversity of citizenship, respondent being a citizen of Louisiana and petitioners being citizens of Texas (R. 4). Petitioner Southland Broadcasting Company is a Texas corporation organized in 1947 and doing business in Louisiana (R. 22). The company was organized for the purpose of engaging in the radio broadcasting business in New Orleans and Shreveport, Louisiana. In 1947 and 1948 the company was granted construction permits by the F. C. C. for Radio Station WMRY at New Orleans and KCIJ at Shreveport.

The original organizers of the corporation were Joe Darsky and the individual petitioners, Kamin, Goldberg and Coon. The original capital stock consisted of 1,500 shares of a par value of $7,500.00, later changed to $22,500.00. Some time prior to July, 1949, Darsky withdrew, leaving the individual petitioners Kamin, Goldberg and Coon as the sole stockholders. (R. 23, 488.) At that time the sole assets of the corporation consisted of the two construction permits and a few hundred dollars in cash.

Upon Darsky's withdrawal, Kamin, Goldberg and Coon determined that they could not acquire the necessary funds to build both radio stations. It was therefore decided to dispose of the construction permit for KCIJ at Shreveport. While the legal title to this permit could not be disposed of without the permission of the F. C. C., it was agreed between Kamin, Goldberg and Coon, then the sole stockhold-

ers of Southland, that thereafter the construction permit for KCIJ would be treated and considered as their individual property, free of all claim by the corporation (R. 14-15, 23-24). They agreed that they would attempt to sell this permit, subject to the consent of the F. C. C., and that the proceeds of this sale would follow the equitable title thereto and inure to the individual benefit of Kamin, Goldberg and Coon. This agreement was without prejudice to the rights of creditors, since there were no creditors at the time. At the same time it was decided that Southland would remain the owner of only one radio station, WMRY at New Orleans, and that part of the corporation's stock would be sold for the purpose of raising funds to build this station.

Respondent Todd became interested in the radio broadcasting business through another corporation, Frequency Broadcasting System, Inc., in which his wife was a substantial stockholder and subscriber (R. 55, 155-156). Frequency being unable to obtain a permit to construct a station in Shreveport, plaintiff Todd and others representing Frequency solicited Kamin, Goldberg and Coon to sell Frequency the construction permit for KCIJ (R. 58, 156-158). These negotiations led to a contract whereby it was agreed that the KCIJ permit would be transferred to Frequency, subject to F. C. C. approval, in consideration of which Frequency would pay one-third of its capital stock, or 500 shares (R. 160-161). Under this arrangement Frequency was to provide the necessary funds for the construction of the station (R. 176-177).

Thereafter Todd negotiated with Kamin, Goldberg and Coon for the purchase of a stock interest in Southland. At the trial Todd conceded that during such negotiation he was advised that Southland owned only the WMRY permit and a few hundred dollars in cash, and that he was not purchasing an interest in KCIJ, directly or indirectly (R. 63, 163-166). Todd further conceded that he knew of the Frequency contract for the purchase of the KCIJ permit in consideration of the payment of 500 shares of Frequency stock, and that he knew that this stock was to go to Kamin, Goldberg and Coon rather than to Southland (R. 69-70, 169-171, 409-410, 422, 528). He further conceded that the purchase price finally agreed upon between him and Kamin, Goldberg and Coon was based solely upon the estimated value of WMRY when completed. That is, it was agreed that WMRY when constructed would be worth $50,000.00, and the purchase price of the 399 shares acquired by Todd was calculated at 399/1,500 of $50,000.00, or $13,300.00 (R. 166-172, 210, 528).

Frequency and Southland entered into a contract whereby Frequency agreed to construct KCIJ on a cost-plus-ten-per-cent basis (R. 445), Frequency to assume all liability upon F. C. C. approval of the transfer of the permit (R. 455). This contract was made with the knowledge of Todd and with his implied consent and approval (R. 176-178).

No actual transfer of control of KCIJ from Southland to Frequency could be effected without F. C. C. approval. From the beginning separate accounting records and bank accounts were maintained by Southland for KCIJ and

WMRY. WMRY went on the air in January, 1950 (R. 68-69), and KCIJ went on the air in April, 1950 (R. 74, 448). From the beginning KCIJ sustained operating losses, which became more and more substantial (R. 81, 178-179). These losses were borne by the credit of and loans from Frequency and Frequency stockholders (R. 77-78, 454, 457, 459, 462, 500). Finally it was indicated that F. C. C. approval for the transfer to Frequency might never be obtained, or if such approval was obtained it would only be after a long delay, and it was deemed advisable that something be done about the state of suspense in which KCIJ was situated. On September 25, 1951, the stockholders and directors of Southland, including Todd, met in Shreveport to consider this situation.

At this meeting the delay in the transfer of the permit was discussed, and also the heavy indebtedness which had been incurred in the operation of KCIJ and the continued operating losses (R. 179, 222). It was pointed out that Southland did not own the beneficial interest in KCIJ, but that KCIJ was the property of Kamin, Goldberg and Coon (R. 179-180). Todd conceded at the trial that he took no exception to such statement (R. 179-180, 181). On the contrary he, with full knowledge of the status of the affairs of both Southland and KCIJ as they existed at such time, acquiesced in the lack of any equity on the part of Southland in KCIJ (R. 181). At this meeting Todd participated in discussions looking to Todd's acquiring an interest in KCIJ, in the same proportion as his interest in WMRY, so

that thereafter KCIJ might become an asset of Southland for all purposes, both as to its legal and equitable title.

These discussions resulted in Todd's voting for a corporate resolution which contemplated cancellation of the existing contract to sell KCIJ to Frequency, and the acquisition by Todd of a stock interest in KCIJ through ownership of Southland stock (R. 86-87, 93-94, 101, 182). The consideration for the re-acquisition of beneficial title to KCIJ by Southland was to be the payment by Todd of $9,300.00 into Southland's capital, and his agreement to extend a loan to Southland to be used for the benefit of KCIJ in the amount of $4,000.00 (R. 94). As additional consideration for Todd's undertaking, Kamin, Goldberg and Coon agreed to provide additional credit for the benefit of KCIJ in the amount of $13,300.00 (R. 94). This resolution was passed by unanimous approval (R. 101). It contemplated that Todd and his wife would sign a letter signifying acceptance of such proposal (R. 101). Resolutions were also adopted providing that if Todd and his wife did not evidence their acceptance of the resolution in writing, KCIJ would be transferred, subject to F. C. C. approval, to a new corporation to be wholly owned by Kamin, Goldberg and Coon (R. 102-103).

Pursuant to the action taken at this meeting, Kamin, Goldberg and Coon immediately made available to Southland, through personal guaranties, loans totalling $15,000.00 (R. 205), and Todd and his wife executed a letter agreement by which they undertook to lend Southland $4,000.00 and to pay an additional $9,300.00 into the

treasury of Southland "for Three hundred ninety nine shares (399) of Stock in Radio Station KCIJ" (R. 112, 122-123). Later Todd and his wife determined not to carry out this commitment, and down to the date of trial they at all times refused demands made upon them for performance (R. 112-113, 115).

In December, 1951, Todd employed attorneys (R. 123, 208), and for the first time asserted that his stock interest in Southland entitled him to a proportionate equity in KCIJ, without any obligation to comply with his purchase contract. Thereafter Todd filed this suit to enjoin the petitioners from transferring KCIJ to themselves, and for an accounting. The case was tried to the trial court without a jury, and at the conclusion of plaintiff's (respondent's) evidence the trial court granted petitioners' motion for judgment, denying the relief prayed for by plaintiff and granting defendants declaratory relief. The United States Court of Appeals determined to be "clearly erroneous" the finding of fact made by the trial court to the effect that the beneficial ownership of KCIJ was vested in Kamin, Goldberg and Coon. Without directing the trial court to proceed with the trial and hear defendants' evidence, the Court of Appeals simply reversed and remanded the case "for further proceedings consistent with this opinion."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call

for an exercise of this Court's power of supervision, in that the Court of Appeals has decided the case without the defendants having had an opportunity to present any evidence, and the Court of Appeals has bound the trial court to decide the case consistent with its opinion which is based upon plaintiff's evidence only.

2. The Court of Appeals has applied Rule 52(a) of the Federal Rules of Civil Procedure in a manner which conflicts with the applicable decisions of this Court, in that the Court of Appeals has held to be "clearly erroneous" a basic finding of fact under circumstances when there could be "no definite and firm conviction that a mistake has been committed."

ARGUMENT

1. The Court of Appeals has denied petitioners due process of law by depriving them of the opportunity to present their evidence in the trial court.

The Court of Appeals in its opinion makes no mention of the fact that this case was before it on a judgment dismissing plaintiff's suit at the close of plaintiff's evidence. It is clear from the record, however, that the case was disposed of before defendants were called upon to put on their evidence (R. 662-663). All of the witnesses were plaintiff's witnesses. While one of the defendants was put on by plaintiff under the adverse party rule, the trial court specifically limited the defendants in their cross-examination of this defendant to the matters which had been covered on direct examination (R. 516).

On the basic question of whether the individual petitioners Kamin, Goldberg and Coon are the beneficial owners of KCIJ, the Court of Appeals in its opinion purports to finally settle the question by holding that they are not the beneficial owners. At no place does this opinion acknowledge the right of defendants to put on their evidence upon a new trial. At no place does it acknowledge the right of the trial court upon remand to determine this question otherwise, upon all of the evidence which may be presented by all parties. The Court of Appeals simply holds that the trial court's finding on this basic question was "clearly erroneous," and then reverses and remands for further proceedings consistent with the opinion. By "further proceedings" it is obvious that the Court of Appeals is referring to the accounting phase of the case (which is not before this Court), and not to the right of defendants to put on evidence relating to the ownership of KCIJ.

Petitioners submit that, under the opinion delivered by the Court of Appeals and any mandate which is consistent therewith, the law of the case with respect to the basic issue has been determined and the trial court will be bound thereby. This, even though the petitioners have had no opportunity to present their evidence. Obviously such a decision denies petitioners one of the basic elements of due process of law.

This situation is analagous to that in *Meccano, Ltd. v. Wanamaker, 253 U. S. 136, 64 L. Ed. 822, 40 S. Ct. 463 (1919)*, which was a suit to restrain patent infringement and unfair competition. There the trial court granted a

preliminary injunction upon affidavits and exhibits supporting the complaint. Upon appeal the plaintiff moved for a final decision on the merits, upon the ground that an intervening decree of another court of appeals, relating to the same matter, was conclusive as to the case at bar. The motion was overruled, and this was affirmed by the Supreme Court. With regard to plaintiff's motion for a final decree this Court said,

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order, and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by ex parte affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court, with opportunity to set up and establish his defenses."

The same situation arose in *Lee v. State Bank and Trust Co., 38 F. 2d 45 (C. C. A. 2nd, 1930)*, where plaintiff's suit was dismissed on defendant's motion at the close of plaintiff's case. There the court stated that, under the modern practice if such a decision be reversed on appeal, a "gross miscarriage of justice may result, if a decree for plaintiff be entered without giving defendant an opportunity to go forward with his evidence." But the Court of Appeals in the case at bar has done exactly that.

What the Court of Appeals should have done is illustrated in *Federal Deposit Ins. Corp. v. Mason, 115 F. 2d*

548 (C. C. A. 3rd, 1940). There the trial court had dismissed the suit at the close of plaintiff's evidence, which the appellate court determined was erroneous. In its opinion the court stated,

> "Since we now hold that the order granting their motion was erroneous and must be reversed it follows that the Civil Procedure Rules require that the defendants now be afforded an opportunity to offer their evidence. We see no reason, however, in a case such as this, which was tried without a jury, to require the plaintiff to offer its evidence a second time. Accordingly we will direct the district judge who heard the plaintiff's evidence to proceed with the trial of the case as though the defendants' motion for dismissal had not been granted by him."

Similarly, in *Gulbenkian v. Gulbenkian, 147 F. 2d 173 (C. C. A. 2nd, 1945)*, the court said in a similar situation,

> "The judgment must be reversed and the cause remanded to afford the defendants an opportunity to offer their evidence. Since the case was tried without a jury there seems to be no reason for requiring the plaintiff to offer his evidence a second time. Federal Deposit Ins. Corp. v. Mason, 3 Cir., 115 F. 2d 548, 552. Consequently we will direct the district judge who heard the plaintiff's evidence to proceed with the trial on the issue of damages as though the defendants' motion for dismissal had not been granted."

And in *Bowles v. Biberman Bros., 152 F. 2d 700 (C. C. A. 3rd, 1945)*, the matter was handled by the following statement in the opinion,

> "As we have stated the defendant moved to dismiss the complaint under Rule 41(b), 28 U. S. C. A. following section 723c, and therefore, on remand, it possesses the right to proceed to its defense."

And this Court has recognized that method of procedure in *U. S. v. United States Gypsum Co., 340 U. S. 76, 95 L. Ed. 89, 71 S. Ct. 167 (1950)*. There the trial court had dismissed the complaint, under Rule 41(b), at the close of the plaintiff's evidence. On a former appeal to the Supreme Court the order of dismissal was reversed and the cause remanded. Regarding the right of the defendants to introduce evidence at the second trial this Court on the second appeal said,

> "Of course, when we remanded the case to the District Court the defendants had the right to introduce any evidence that they might have as to why all or any one of them should be found not to have violated the Sherman Act. Our reference at 333 U. S. 402, footnote 20, to Gulbenkian v. Gulbenkian (C. A. 2d N. Y.), 147 F. 2d 173, 158 A. L. R. 990, shows that. See Federal Deposit Ins. Corp. v. Mason (C. A. 3d Pa.), 115 F. 2d 548, 552; Bowles v. Biberman Bros. (C. A. 3d Pa.), 152 F. 2d 700, 705."

The failure of the Court of Appeals in the case at bar to instruct the trial court to hear defendants' evidence was vigorously called to the attention of the appellate court in a motion for rehearing, but that motion was overruled without comment (Appendix C). It can hardly be concluded that the Court of Appeals was assuming the trial court would grant defendants that right, when the Court of Appeals in its opinion does not appear to recognize that the case has not been fully tried below. Petitioners submit that they should not be subjected to the risk that the trial court upon a retrial may conclude that it is bound by the holdings of the Court of Appeals as being the law of the case, but

that on the contrary petitioners are entitled to have this Court clarify their rights upon remand, as the Court of Appeals should have done.

2. The Court of Appeals erred in holding to be clearly erroneous the finding of the trial court to the effect that petitioners Kamin, Goldberg and Coon were the beneficial owners of radio station KCIJ.

Under Federal Rule of Civil Procedure 52(a), the basic finding of fact here (that Kamin, Goldberg and Coon were the beneficial owners of KCIJ) could be reversed by the appellate court only if "clearly erroneous." This Court has said that a finding is clearly erroneous when the reviewing court on the entire evidence is left with the "definite and firm conviction that a mistake has been committed." *U. S. v. United States Gypsum Co., 33 U. S. 364, 94 L. Ed. 746, 68 S. Ct. 525 (1948).*

This Court has said further that the rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony. *Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, 93 L. Ed. 672, 69 S. Ct. 535 (1949).* We earnestly submit that here the appellate court did not apply Rule 52(a) to the basic finding in this manner. On the contrary it simply donned the robes of the trial judge and decided the case as if it had heard the testimony and was entitled to award a judgment according to which way it felt the evidence preponderated.

The trial judge having decided the case for the defendants, may the appellate court reverse that judgment simply

because it would have decided the case the other way had it presided at the trial? We think not. And on that subject this Court has said in *U. S. v. Yellow Cab Co., 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949),*

> "* * * While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous'."

The appellate courts of our federal judiciary are not the triers of fact even in close cases. As was said in *Leach v. Maryland Casualty Co., 183 F. 2d 43 (C. A. 7th, 1950),*

> "That it is a close case on the facts is hardly open to doubt; in fact, it is so close that the controlling issue of fact could well have been found either way. This court, however, as oftentimes stated, is not the trier of facts; that is the function of the court below and we are without right to refuse to accept or to set aside the finding thus made 'unless clearly erroneous.' This we cannot say."

Petitioners feel that even a cursory examination of the significant portions of the testimony will reveal that the basic finding could in no sense of the words be "clearly erroneous." The following testimony of plaintiff and his own witnesses seems to eliminate any doubt:

1. Respondent Todd freely admitted that the purchase price of his stock in Southland was calculated on the basis

of the value of Radio Station WMRY alone, although Southland held legal title to the KCIJ construction permit at the time (R. 166-172, 210). Thus to award him an interest in KCIJ, through Southland, will give him a windfall for which he concedes he has paid absolutely nothing.

2. Respondent Todd freely admitted that, when he purchased Southland stock, he knew he was buying an interest in WMRY only (R. 163, 165, 169, 171, 187, 193, 198, 221-222).

3. Before he purchased stock in Southland Todd was told that Southland's permit for the construction of KCIJ was to be sold to Frequency, and that the consideration (500 shares of Frequency stock) was to be the property of Kamin, Goldberg and Coon individually (R. 69-70, 169-171, 409-410, 422, 528).

4. Respondent Todd admitted that Southland was to end up with WMRY only (R. 95, 409-410, 420-421, 423, 424, 429, 528). His principal complaint, and his supposed justification of his later claim to equal rights in KCIJ, seem to be his claim that petitioners Kamin, Goldberg and Coon, as the original organizers of Southland, paid less for their stock than Todd paid for his (R. 96-100).

5. Respondent Todd had attended a stockholders' meeting where it was explained that he had no interest in KCIJ, and Todd made no protest of any nature (R. 179-180, 181). On the contrary he admitted at the trial that he voted for

a corporate resolution reciting that KCIJ was not a Southland asset, and calling upon him to make a contribution to Southland capital in consideration of the agreement of Kamin, Goldberg and Coon allowing Southland to reacquire the beneficial title to KCIJ (R. 86-87, 101, 102).

6. Todd testified that his secret feelings were that, if the transfer of KCIJ to Frequency did not go through, he should share in the ownership and profits of KCIJ because the assets of Southland would have to support KCIJ (R. 109, 141, 199-200). But it is interesting to note that, prior to the stockholders meeting at which Todd voted to purchase an interest in KCIJ through Southland's reacquisition of the beneficial interest therein, WMRY had advanced for the operations of KCIJ only the sum of $360.31 (R. 347-348, 465, 499). Thereafter, Todd and his wife having signed a contract agreeing to purchase a proportionate interest in KCIJ, through his Southland stock, petitioners were certainly entitled to assume that Todd would perform his contract and that the ownership of both stations would be identical (R. 475-476). It was only natural, then, that the funds of WMRY would be used to some extent for the support of the other station thereafter. For Todd to complain of advances thereafter made from WMRY to KCIJ seems to be without any justification, since he himself was responsible for this state of affairs.

Of course, if WMRY is indebted to KCIJ, this can be easily adjusted in an accounting. But Todd's claim that the mere making of the advances changed the title to all of the assets of KCIJ, when the construction permit ad-

mittedly was the property of Kamin, Goldberg and Coon and the advances were made only after Todd signed his agreement to purchase an interest in KCIJ, seems to be wholly without merit.

7. Todd also claims that the construction permit for KCIJ, which he admits was owned by Kamin, Goldberg and Coon, should be treated separately from the physical assets connected with the station itself. As to the latter, Todd's theory is that they were never owned beneficially by Kamin, Goldberg and Coon because the credit of Southland was committed to build KCIJ, and the indebtedness was paid off out of profits of KCIJ. It is true that Southland's credit was committed by virtue of the construction contract with Frequency, whereby Southland agreed to pay Frequency to build the station on a cost-plus basis (R. 445). But at that time Frequency was committed to purchase the station, and the construction contract was executed because the transfer could not take place without F. C. C. approval. It is clear from the record that this contract had Todd's approval, because his wife being a stockholder in Frequency it was to his interest to have the transfer of KCIJ made from Southland to Frequency (R. 176-178, 215). And it is also clear that ample provisions have been and will be made for the assumption of any such indebtedness, and for the indemnification of Southland against such indebtedness, if this Court affirms the trial court's decree (R. 103, 140). Under the original understanding between Petitioners and Todd, whereby the legal title to KCIJ was in Southland but the beneficial ownership was in Kamin,

Goldberg and Coon, of course Southland as trustee for Kamin, Goldberg and Coon would have to obligate itself for the payment of any debts relating to the trust *res*. But certainly Kamin, Goldberg and Coon, as the beneficiaries of the trust, would be the parties ultimately liable, and Southland as the trustee would be entitled to reimbursement and indemnification against obligations assumed by it within the authority of the trust. Todd's theory that the incurring of indebtedness by a trustee, for the benefit of the trust *res*, changes the beneficial ownership of the property from the beneficiary to the trustee, is indeed a novel theory when examined in this light.

8. At the stockholders' meeting in September, 1951, petitioners Kamin, Goldberg and Coon stated to Todd that KCIJ was badly in need of funds (R. 179, 222), and that they were going to obtain credit for KCIJ's operations through their personal guaranties (R. 224). Todd suggested that he should be permitted to make his contribution in the same manner (R. 224). Kamin, Goldberg and Coon, however, did not agree to that. They stated to Todd that he had no interest in KCIJ, and that he would first have to buy an interest in it (R. 224). With that background, Todd proceeded to purchase an interest in KCIJ (R. 224). The written agreement executed by Todd and his wife, wherein they agreed to purchase "Three hundred ninety-nine shares (399) of Stock in Radio Station of KCIJ" (R. 122), constitutes a conclusive admission that respondent was agreeing to purchase something he did not then own. Since Todd has at all times refused to go through

with the purchase, it seems logical to assume that the ownership of KCIJ would remain as Todd admitted it was originally—in Kamin, Goldberg and Coon.

9. Todd inferred at the trial that the agreement which he and his wife signed to purchase an interest in KCIJ was signed "under duress." The compulsion he relied upon was a statement allegedly made by petitioner Kamin that if the letter was not signed, he (Kamin) would see that Todd "never got a dime out of it" (R. 110-111). Far from being any form of duress, this statement, if made, seems to mean only that Kamin contended Todd owned no interest in KCIJ, and that unless Todd agreed to buy such an interest Kamin would see that he did not share the profits which might accrue from KCIJ. At the trial Todd did not purport to know what Kamin meant by the statement, but admitted that he did not know (R. 111). This seems to be a very flimsy basis on which to attempt to avoid the obligation of a contract, and upon which to attempt to avoid an admission that Todd had no stock interest in KCIJ.

The Court of Appeals does not attempt to explain away the compelling testimony discussed in numbered Paragraphs 1 through 9 above. On the contrary the Court of Appeals starts with the incorrect premise that Todd voted against the arrangement calling upon him to buy a stock interest in the assets of KCIJ. (See the court's statement that Todd voted against the resolution, at 231 F. 2d 229. See Todd's testimony at R. 182, where in three different places he testified that he voted for the resolution. Also the minutes indicated Todd voted for it. R. 101.) The court

then simply announces, without any discussion of the record, that KCIJ was not the property of Kamin, Goldberg and Coon, but was owned by Southland. The court does not mention the fact that Todd had agreed that KCIJ would be beneficially owned by Kamin, Goldberg and Coon. The court does not mention the fact that, when Todd signed an agreement to purchase a stock interest in KCIJ, he admitted he owned no such interest. The court cites cases dealing with the law relating to forfeiture of contract rights, but does not attempt to explain how Todd ever acquired any rights in KCIJ which could be the subject of a forfeiture.

We submit that the inequity of the result reached by the Court of Appeals is obvious. It permits Todd to acquire a 29% interest in KCIJ for nothing, when he had agreed to pay $15,950.00 for a 10% interest in the same station through subscription to Frequency stock (R. 161-162, 425). It permits him without cost to acquire an investment the entire value of which was created by the efforts and individual credit of Kamin, Goldberg and Coon (R. 82, 474). It permits him to acquire without any contribution the fruits of the KCIJ construction permit which he freely admitted was owned by Kamin, Goldberg and Coon, for which they had refused an offer of $12,000.00 made by Todd and his associates through Frequency (R. 159-160). Without appearing to recognize the obvious inequity of this situation, the Court of Appeals simply concludes that the trial court's finding relating to the beneficial ownership of KCIJ was "clearly erroneous."

CONCLUSION

In conclusion, petitioners respectfully submit:

1. That the decision of the Court of Appeals should be reversed because it deprives petitioners of the right to present their evidence, and binds the trial court to proceed consistent with its opinion which is based on respondent's evidence alone.

2. That the decision of the Court of Appeals should be reversed because there is no evidence in the record upon the basis of which the appellate court could, consistent with the interpretation of Rule 52(a) as announced by this Court, hold that the basic finding of the trial court is clearly erroneous.

Wherefore, petitioners pray that the decision of the Court of Appeals be reversed and that of the trial court affirmed, or in the alternative, that the decision of the Court of Appeals be modified so as to direct the trial court to proceed with the trial as though petitioners motion for judgment had not been granted.

Respectfully submitted,

PAT COON,
Pro se and Counsel for the Other Petitioners.

.....

PAT COON.

Of Counsel:

.....

HAROLD HOFFMAN.

PROOF OF SERVICE

I, Pat Coon, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of July, 1956, I served a copy of the foregoing Petition for Writ of Certiorari on Rex F. Todd, respondent, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to his attorneys of record, B. Jeff Crane and Ben H. Rice, c/o Vinson, Elkins, Weems and Searls, 11th Floor, Esperson Building, Houston, Texas.

.....

PAT COON.
1900 Adolphus Tower,
Dallas, Texas.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,536

REX F. TODD,

Appellant,

v.

SOUTHLAND BROADCASTING COMPANY, LESTER KAMIN, BILLY B. GOLDBERG and PAT COON,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

(March 20, 1956.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant, Rex F. Todd, is a citizen of Louisiana. The appellee, Southland Broadcasting Company, is a Texas corporation. The other appellees, three individuals, Lester Kamin, Billy B. Goldberg, and Pat Coon, are citizens of Texas. Plaintiff sues as a stock-

holder of and on behalf of Southland Broadcasting Company charging mismanagement and misfeasance of the individual defendants in the operation of the Company. Federal jurisdiction is dependent upon diversity of citizenship. *Doctor v. Harrington, 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606.* The individual parties will be sometimes designated by name and the corporate appellee will be sometimes referred to as Southland.

Southland was incorporated in 1947 with 1,500 shares of common stock of the par value of $5 per share. Joe Darsky subscribed for 765 shares. The other stock was originally acquired by Kamin, Goldberg, and Coon. The Darsky stock was surrendered to Southland in 1949. Southland had two permits from the Federal Communications Commission to construct radio stations, one, WMRY, at New Orleans, and another, KCIJ, at Shreveport. Frequency Broadcasting System, a corporation which had been promoted in large part by appellant and of which appellant's wife was a substantial stockholder, had applied for a permit to erect and operate a radio station at Shreveport. The permit was not granted. The appellant purchased 399 shares of Southland treasury stock. It was then contemplated that Frequency would build station KCIJ for Southland with funds of Frequency, and that Southland would transfer KCIJ to Frequency in consideration of 500 out of a total of 1,500 shares of Frequency's stock. These 500 shares, it was understood, were to be distributed to Kamin, Goldberg, and Coon, and that the interest of appellant and his wife in

KCIJ would inure from a stock ownership in Frequency rather than through Southland.

WMRY in New Orleans was completed and put in operation in January of 1950. KCIJ went on the air in April, 1950. At the outset it sustained operating losses. The Federal Communications Commission delayed action upon the application for the transfer of the Shreveport station from Southland to Frequency. The appellant, a resident of Shreveport, spent considerable time assisting in the operation of KCIJ. In September of 1951, the stockholders and directors of Southland, of whom appellant was one, met to consider the condition of KCIJ. At this meeting it was proposed and a resolution of the stockholders directed that the effort to procure a permit for the transfer of KCIJ to Frequency be abandoned. Then a resolution was adopted in which it was recited that when appellant purchased his Southland stock the contract for the transfer of KCIJ had been made and hence Southland would own only one station, WMRY, but if Southland retained KCIJ it would own two stations. The resolution provided that, if the Federal Communications Commission permitted the withdrawal of the application for transfer, Kamin, Goldberg, and Coon would endorse the corporation's note for $13,300 "and in consideration therefor" the appellant agreed to pay $9,300 into the treasury of Southland "as further consideration for the capital stock purchased by him" and the appellant would lend $4,000 to Southland. It was further resolved that each of the four principal stockholders would evidence his acceptance of the proposal by a letter to the corpora-

tion. At this meeting another resolution was adopted reciting that salaries of officers had been set up but the financial circumstances made it inadvisable that they be paid or carried on the books and such salaries were "stricken from the books and records." By this resolution it was "mutually agreed between the stockholders" that officers and directors receive no salary or compensation for services until Southland's debts become liquid and current "unless this is changed by a vote of all of the stockholders." Appellant testified that there was a discussion of the possibility of Southland going into bankruptcy.

In November of 1951, Kamin went to Shreveport and while there the appellant wrote and signed a letter in compliance with the resolution relating to his proposed advances to the corporation. The terms of the letter were dictated, so appellant testified, by Kamin, and signed by appellant acting, so he said, under a threat of Kamin that if appellant didn't "go along with their way on the thing he [Kamin] would see that I [appellant] never got a dime out of it." In the letter, which was written during the latter part of November, 1951, and directed to Kamin as President of Southland, it was provided that the appellant would pay $4,000 into the treasury of Southland in the form of a loan, and would pay $9,300 for 399 shares of Southland stock in three semi-annual payments beginning March 1, 1952, if needed. In the event the money was not needed the $9,300 should be deducted from any dividends due and owing to appellant. The appellant testified that at this meeting Kamin told him that the money wouldn't be

needed right away. About this same time, perhaps as a part of the same transaction, Southland bought from J. E. Wharton his Southland stock, 177 shares, of which 150 shares had been purchased for $5,000 and 27 shares had been issued for services as a radio engineer. The price agreed upon for the resale to Southland was $20,000, of which $5,000 was paid at the time of the deal. Soon after appellant had given the letter to Kamin, perhaps within a week or two, Kamin telephoned appellant and asked him to put up the money as agreed. Appellant did not make the loan as he had agreed by letter. This refusal was followed by a letter from Goldberg, then Secretary of Southland, to appellant saying that the manager of KCIJ was being advised that appellant had not purchased and did not own any interest in KCIJ and that the manager would be expected to receive his orders from Kamin, then President of Southland. Thereafter appellant did not participate in the operation of KCIJ.

In October 1952, the appellant stated that the agreement regarding KCIJ was made under duress and he would not comply with it. A new Board of Southland was elected, not including appellant. The minutes of an October 25, 1952, meeting of the Board of Directors recited a statement of the President that the affairs of the corporation had been and were being managed by a Management Committee of Kamin, Coon and Goldberg, each of whom was voted a salary of $7,200 for the year 1952. In February 1953, at a stockholders' meeting a resolution was adopted upon the votes of Kamin, Goldberg and Coon, by which it was pro-

vided that Southland should seek Federal Communications Commission approval of a transfer of KCIJ to a new corporation to be wholly owned by Kamin, Coon and Goldberg. The appellant, Southland's only other stockholder, voted by proxy against the proposal. The appellant filed suit the following month, March 1953, seeking an injunction against the transfer of Radio Station KCIJ to Kamin, Goldberg and Coon, or to a corporation formed by them, or otherwise except for a full consideration and with the approval of eighty per cent of the holders of Southland stock. The appellant sought also an accounting from the individual appellees of their transactions with the corporation.

Much testimony was taken at the trial. It appeared that separate accounting records were kept for each of the two radio stations and a considerable number of cross-entries between the accounts of the two stations were made on the corporation's books from time to time. On one occasion $20,000 was borrowed for income tax payments and charged to KCIJ. The accounting and cross-accounting as between the two stations is confusing. That the Certified Public Accountant who audited Southland's books was not wholly free from this confusion is indicated by his response to a question put by the Court regarding the above-mentioned $20,000 borrowing. The witness, Earl F. Walborg, said:

> "Well, I put down my explanation here. The way I see it, the intention of this entry is apparently to infer that Station KCIJ made a loan of $20,000 at WMRY's bank, the Progressive Bank, in New Orleans, and de-

posited the funds to the WMRY bank account. Actually, the loan liability was and is recorded on the WMRY books."

The payments made on the Wharton stock, something over $15,000, were originally credited to KCIJ, later transferred to WMRY. On one occasion the accountant said that if WMRY and KCIJ had separate books, as distinguished from separate accounts in the same set of books, each would have been out of balance by $20,000. The corporation began making money early in 1952. In that year Southland had earnings before Federal income taxes and officers' compensation of $67,750. In 1953 the comparable figure was $68,814. Salaries and bonuses to Kamin, Goldberg and Coon were paid or accrued for 1952 in the amount of $21,600 and for 1953 in the amount of $36,000. Advances were made, from time to time, of Southland's funds, to John H. Pace, Manager of KCIJ. It is indicated that some of these funds were to be used for promoting television stations to be owned, in whole or in part, by the individual appellees in competition with Southland and in which neither appellant nor Southland would have any interest.

The court made findings of fact and conclusions of law. The basic finding was that appellant understood at the time of his acquisition of Southland stock that station KCIJ was to be the individual property of Kamin, Goldberg and Coon, free and clear of any claim of Southland. It was found that in 1951 the financial affairs of KCIJ were desperate, that resolutions were adopted providing that if appellant did not evidence his acceptance of the

prior resolution in writing, KCIJ should be transferred to a new corporation to be wholly owned by Kamin, Goldberg and Coon. There are findings that appellant is in default, that salaries paid to the individual appellees were fair and reasonable, that beginning with the first of the year 1952 the obligations of KCIJ were current and liquid. As matters of law the court concluded that appellant was wholly without equity, and judgment was entered denying appellant any relief. The court determined that Kamin, Goldberg and Coon were the beneficial owners of KCIJ, and, upon approval of the Federal Communications Commission, it should be transferred to the individual appellees or to their nominee.

If there be an acceptance of the underlying finding of fact that the beneficial ownership of station KCIJ was vested in the individual appellees, Kamin, Goldberg and Coon, then perhaps Rule 52, Fed. Rules Civ. Proc., would require an affirmance. *But we are convinced that the basic finding was clearly erroneous.* We find, on the part of the individual appellees, a piercing of the corporate veil and a disregarding of the corporate entity that can be sustained only by an agreement of all of the stockholders. At the time the appellant acquired his stock in Southland there was an agreement that, if the Federal Communications Commission approved, station KCIJ would be transferred, not to Kamin, Goldberg and Coon or their nominee, but to Frequency, of which appellant's wife was a stockholder. For KCIJ, Southland was to receive one-third, or 500 shares, of the stock of Frequency for distribution to the three indi-

vidual appellees. The September resolution, adopted by the vote of the individual appellees, as majority stockholders of Southland, recited that KCIJ needed additional capital immediately. It was resolved that the request for the transfer be withdrawn and that appellant should pay $9,300 as further consideration for his stock and lend the company $4,000.

Appellant voted against the resolution. His acquiescence in the resolution by the letter would have the same effect as if he had voted for it unless, as he contended, his letter acceptance was induced by duress. However, the appellant did not vote for or acquiesce in the resolution thereafter adopted that if appellant did not perform, station KCIJ would be transferred to a corporation wholly owned by Kamin, Goldberg and Coon.

At the time of the meeting in September, 1951, the appellant was a stockholder of Southland and, although a minority stockholder he was the owner of more of its shares than any other stockholder. Station KCIJ was not the property of the individual appellees. It was owned by and an asset of Southland. It was subject to the agreement that it should be transferred to Frequency if the required governmental approval was given. There was no agreement, to which the appellant gave assent, that in any event or upon any condition should station KCIJ be the individual property of Kamin, Goldberg and Coon, or of a corporation wholly owned by them. The question has been raised as to whether there is a consideration for the appellant's agreement to

make the loan and make a further payment for his stock. There was not only the undertaking of the individual appellees to guarantee loans to be made by others to Southland, but there was the action by them as directors and stockholders to withdraw the application for approval of the transfer of KCIJ to Frequency. We find a consideration for the agreement and shall not inquire as to its adequacy. It does not follow, however, that for a breach of the agreement the appellant should be subjected to a penalty of the forfeiture of his beneficial interest existing through his stock ownership, of the most valuable asset of the company of which he held *thirty-nine per cent* of the stock. It is the law of Texas that:

> "Forfeiture of rights or property by virtue of stipulations in contracts is regarded as forfeitures generally are—that is, with disfavor. If the language of an agreement is fairly susceptible of an interpretation which will prevent a forfeiture, it will be so construed, for in this case also a strict construction is favored." 19 Tex. Jur. 803, Forfeitures §7.

Here, the appellant not only was not a party to any agreement but if there was any agreement for a forfeiture, it was between the individual appellees and Southland, opposed by appellant, and which could not be effected without his assent.

There is still another reason why the individual appellees should not be permitted to divest Southland of station KCIJ for their own exclusive benefit. In accord with principles universally accepted, we find the law of Texas

on the dealings between a corporation and its directors to be as follows:

> "It has been said that no case can be found where a director has been permitted to deal personally with the corporation, or with his codirectors acting for it, where his vote was necessary to the action taken. On the other hand, there is authority to the effect that such contracts, when made with the efficient aid of the contracting director, are presumptively invalid, that they are subjected to the severest scrutiny, and set aside unless all appearance of bad faith is removed by the evidence. Even where the disinterested directors are a majority, and they vote the transaction, they cannot deal with the interested director as with a stranger, because of his intimate knowledge of the affairs of the corporation and his position to exercise influence over those associated with him in its management. While the transaction, if otherwise unassailable, is not void because interested directors constituting a minority use their position for the purpose of advancing their own interests, any want of good faith, reflected in the unfairness of the transaction to the corporation, will render it voidable even though sanctioned by a qualified majority of the directors." 10 Tex. Jur. 959, Corporations, §306. Cf. 13 Am. Jur. 955, Corporations, §1002 et seq.

The foregoing rule has been well stated by the Texas Court of Civil Appeals in saying:

> "All authorities so far as we know denominate the relation between a director of a corporation and the corporation itself, which is treated as a separate entity, a trust relation. In many of them, applying the principles of equity, it is held that he cannot deal with the corporation or other directors acting for it, when personally concerned, whether beneficial to himself or otherwise, on the broad ground that the corporation is entitled to the disinterested management and judg-

ment of the director, and no rule will be permitted that might be productive of contrary results. While the rule has not been so broadly stated or applied in this state, as may be seen from an interesting discussion of the subject by Justice Williams of our Supreme Court in the case of Tenison v. Patton, 95 Tex. 284, 67 S. W. 92, yet we know of no case where a director has been permitted to deal with the corporation or his co-directors in his personal interest, where his vote was necessary to the action taken. Thus in the case cited (page 293 of 95 Tex., page 95 of 67 S. W.) it is said: 'The corporation is a separate entity, for which its board of directors acts. The persons having the beneficial interest in the property are the stockholders; but their rights are centered in the corporation, and are managed and controlled through the board of directors as the active representatives of the company, and it is through it, and not the stockholders, that business dealings are carried on. When a personal interest of one of them springs up adverse to that of the corporation, it disqualifies him to act concerning it as one of the representatives or agents'." *Greathouse v. Martin*, 91 S. W. 385, aff. 100 Tex. 99, 94 S. W. 322.

Again it is said:

"It is a wholesome and thoroughly settled rule that a director of a private corporation cannot vote, with propriety in a matter affecting his private interest, any more than a judge can sit in his own case. * * * And, when he violates this rule of propriety, and enters into a contract with the corporation, especially a contract of purchase of corporate assets, and his vote as a member of the board is necessary to the passage of the resolution authorizing it, the action of the board is sometimes void, and in all cases voidable, at the instance of the corporation, or of its stockholders, or of its injured creditors." *Texas Auto Co. v. Arbetter*, 1 S. W. 2d 334.

Such being the rule, the three individual appellees, as directors, could not take from the corporation one of its principal assets and divert it to themselves in its entirety merely because they were unable to get prompt approval for the transfer to Frequency of which they were to own but a third of the stock.

The individual appellees, as directors, with the concurrence of appellant as a director, cancelled all accrued compensation to officers and directors in September, 1951, and provided that none should be paid until the debts of Southland became liquid and current. They dropped appellant from the board in October, 1952, and forthwith voted themselves $7,200 each for compensation as members of the Management Committee. These payments were for the year 1952, a period of which nearly five-sixths had expired when the resolution purporting to authorize it had passed. For 1953 the $7,200 annual payments to each were continued and for that year they voted each of themselves a $4,800 bonus. There was no formal authorization by the directors of the creation of a Management Committee. It was merely the majority stockholders giving themselves a name under which they would operate without their minority stockholder. All of the individual appellees are residents of Houston, Texas. The two radio stations are in Louisiana. The President of Southland, Lester Kamin, operates an advertising agency in Houston. The Secretary and Treasurer, Billy B. Goldberg, maintains a law office in that city. It appeared from the testimony of Mr. Goldberg, the only one of the individual appellees who testified,

that Kamin, Coon and himself had organized a corporation which had applied for a television permit to operate with the WMRY tower of Southland under an agreement which they, as directors of the new corporation, would negotiate with themselves as directors of Southland.

The trial court found that "In the light of the services performed, the revenues obtained and the net profits made, the salaries paid to the management committee were entirely fair and reasonable and not excessive." The first compensation which the individual appellees took from the corporate treasury as compensation for their services was the $7,200 paid to each for 1952. These payments were for a period retroactive to the beginning of the year. Such payments have the disapproval of the Texas courts. The Texas Court of Civil Appeals has held:

> "An increase in salary, or additional compensation, or back salary, or pay—a bonus—may not be voted to a director or directing officer of a corporation, *when the vote of the beneficiary himself is necessary to the adoption of the proposition.*" *A. J. Anderson Co. v. Kinsolving*, 262 S. W. 150.

This court has had occasion to declare the same doctrines and has said:

> "We need not write extensively on the legal principles governing the voting of bonuses, that is increased compensation for services already rendered gratuitously or for a prescribed compensation, where there is neither express or implied understanding that additional compensation may be granted. They are well settled and well known. Under well established principles of corporation law, directors and officers are quasi-trustees for the corporation and the stockhold-

ers, they hold office under an implied obligation to serve them faithfully, they may take no personal advantage of their possession of power. As to bonuses, which are merely gratuitous payments, and as to similar retroactive increases of salary, it is Hornbook law that, except where there has been an express or implied understanding that they may be granted if conditions warrant, there is no consideration for them, and their grant by the directors alone will not sustain them against attack by stockholders. It is true that normally the *stockholders may grant them or ratify their granting.* Even they may not do so, however, with the purpose or the result of overreaching or working a fraud or imposition on the corporation, the minority stockholders or other unprotected interests. It is sufficient for the purpose of this case to say: that gratuitous bonuses and additional compensation granted by directors, for services already rendered under fixed salaries are normally without consideration in law; that they are, therefore, suspect and will be readily upset unless their propriety is made clearly to appear, that where, as was the case here, in respect of the additional compensations awarded retroactively in June, 1943, the fact that the directors who voted them were also owners of all the common stock will not save them from attack; and that they will be disallowed if it is made to appear that either their purpose or their result has been not to award reasonable compensation for services, but to impose upon or overreach preferred stockholders." *Hurt v. Cotton States Fertilizer Co.*, 5th Cir. 1947, 159 F. 2d 52.

The amount of the *payments* made to the individual appellees for that portion of the year 1952 prior to October 25, 1952, *should be restored* to the corporation. The same is true as to all other retroactive bonuses. The appellee, Billy B. Goldberg, outlined in some detail the activities of himself and the other individual appellees during the time

of the organization and promotion of Southland prior to 1952. There is much less information for the subsequent period. It was his testimony there was a station manager at both stations and the "management committee," so called, handled the "top management," the "long-range short range policy decisions" and was the "sole managing entity within the corporation." As a guide to our decision, we again turn to the law of Texas as pronounced by its courts. The Supreme Court of that State had occasion to consider a case where a stockholder had brought suit on behalf of a corporation against Martin, the corporate treasurer, whose salary was fixed by the treasurer's vote as a member of the board of directors. It was held:

> "Where the proof showed that the action of the board of directors was not binding on the corporation, the *plaintiff was entitled to recover* from Martin *the money which had been paid* to him under that invalid order, *unless* Martin *could show himself entitled to retain it by reason of the fact that he had performed valuable services for which he would be entitled to just compensation.*" *Greathouse v. Martin*, 109 Tex. 99, 94 S. W. 322.

The burden of proof was upon the individual appellees to show that they were entitled, as on a quantum meruit, to the compensation which they drew.

We think the individual appellees must make a full accounting of all of the transactions of the corporation made with them or for their benefit or with any corporation or other entity in which they had an interest. All such transactions should be the subject of full disclosures and

careful scrutiny. Accountings should not be based upon apparent inferences.

For further proceedings consistent with this opinion, the judgment appealed from is

REVERSED AND REMANDED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit

(SEAL)

APPENDIX B

JUDGMENT

Extract from the Minutes of March 20th, 1956

No. 15,536

REX F. TODD,

v.

SOUTHLAND BROADCASTING COMPANY, LESTER KAMIN, BILLY B. GOLDBERG and PAT COON

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Southland Broadcasting Company, Lester Kamin, Billy B. Goldberg and Pat Coon, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

SEP 4 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 279

SOUTHLAND BROADCASTING COMPANY,
LESTER KAMIN, BILLY B. GOLDBERG,
AND PAT COON,

Petitioners and Appellees below,

v.

REX F. TODD,

Respondent and Appellant below.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
B. JEFF CRANE
BEN H. RICE, III

C. E. BRYSON
11th Floor, Esperson Building
Houston, Texas
Counsel for Respondent

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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IN THE

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No. 279

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Petitioners and Appellees below

v.

REX F. TODD,

Respondent and Appellant below.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

In opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, received on July 20, 1956, Rex F. Todd, Respondent herein and Appellant below, would respectfully show the Court as follows:

Opinions Below

The District Court filed Findings of Fact and Conclusions of Law (R. 669-689), and rendered a final decree (R. 689-691), but no opinion was published. The opinion of the Court of Appeals is reported at 231 F. 2d 225.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the individual Petitioners, who as the officers, directors and controlling stockholders of the corporate petitioner, were defendants in an action by the minority stockholder on behalf of the corporation to permanently enjoin the transfer to themselves of substantial assets standing in the name of the corporation, are entitled as a matter of due process of law to a de novo hearing before the District Court after the Court of Appeals has reversed the judgment of the District Court, denying Respondent all relief and granting affirmative relief to Petitioners, which judgment of the District Court was rendered upon Petitioners' motion made at the conclusion of Respondent's evidence; all proceedings having been before the Court without a jury, and Petitioners not having identified or otherwise made known to any court the nature or purport of the evidence they might desire to offer, and having treated the evidence as fully developed for the purpose of their affirmative defenses and their cross-action in both the District Court and the Court of Appeals.

2. Whether the facts as shown by the record support the individual Petitioners' claim of beneficial ownership in themselves, as against Southland Broadcasting Company, of Station KCIJ, its business and assets.

Statement of the Case

This is a shareholder's action for an injunction and accounting. Respondent was Plaintiff. Petitioners were Defendants.

Respondent is a citizen and resident of the State of Louisiana. Petitioner Southland Broadcasting Company is a private corporation organized under the laws of the State of Texas. It owns and operates two radio stations located in the State of Louisiana. Respondent owns 399 shares of the stock of this company. The authorized capitalization is 1500 shares.

Petitioners Lester Kamin, Billy B. Goldberg, and Pat Coon are the directors and officers of Southland Broadcasting Company. They each own 308 shares of the stock. They have voted together at all stockholders meetings and exercise control of the corporate affairs. They are all citizens of the State of Texas.

Petitioner Kamin operates the "Kamin Advertising Agency" at Houston, Texas. Petitioner Goldberg is an attorney at law at Houston, Texas. Petitioner Coon is an attorney at law at Dallas, Texas. He has signed Petitioner's Application as a member of the bar of this Honorable Court.

The controversy is of some years' standing. It came to a head in February, 1953, when the individual Petitioners adopted a stockholders' resolution, over Respondent's protest, to transfer the assets comprising Radio Station KCIJ

out of Southland Broadcasting Company to a new corporation wholly owed by the individual Petitioners. (R. 138-140).

Respondent filed a verified complaint on March 16, 1953, seeking to enjoin such transfer, and also seeking an accounting and restoration to the corporation of any funds shown to be due to the corporation from the individual Petitioners. (R. 4, 8-9).

Petitioners' Answer asserts that the individual Petitioners are the beneficial owners of Radio Station KCIJ as against both Respondent and Southland Broadcasting Company. (R. 17). Petitioners pleaded the facts on which they based their claim of ownership, and prayed for affirmative relief in the form of a declaratory judgment "establishing their equitable and beneficial ownership of Station KCIJ, Shreveport, Louisiana", and authorizing them to transfer such station to themselves. (R. 41-42).

The trial was to the Court without a jury. It began October 12, 1954, and continued more than two days. Much evidence was offered by Respondent, including the testimony of Petitioner Goldberg; the testimony of the corporation's bookkeeper, an employee of Petitioner Kamin; and the corporate records.

At the conclusion of Respondent's evidence, Petitioners made an oral motion for judgment. (R. 662). The Court, after receiving briefs and suggested findings of fact and conclusions of law, rendered judgment for Petitioners denying all relief sought by Respondent and granting the individual Petitioners' prayer for judgment declaring that they were the beneficial owners of all of the assets comprising Station KCIJ. (R. 690-691).

The Court of Appeals, upon consideration of the entire record, held that Station KCIJ was the property of Southland Broadcasting Company. Accordingly, the Court of Appeals reversed the trial court judgment and remanded the cause for further proceedings consistent with the opinion of the Court of Appeals.

In their application to this Court, Petitioners attack the judgment of the Court of Appeals on two grounds. They say, first, that such Court should have ordered the trial court to give Petitioners a de novo hearing on their claim of ownership; and, second, that the Court of Appeals was in error in concluding, on this record, that Station KCIJ belongs to the corporation and not to the individual Petitioners. It is Respondent's position that the record demonstrates that there is no material issue of fact with regard to the ownership of Station KCIJ and that the Court of Appeals was correct in its determination.

Petitioners' Answer is quite lengthy. It does not dispute, and Petitioners admitted at the trial, that legal title to the assets comprising the disputed station stands in the name of Southland Broadcasting Company. (R. 525-526). Petitioners seek to derive equitable title to these assets by virtue of an agreement between themselves, individually, and Respondent at the time Respondent purchased his 399 shares of stock from the corporation's treasury in November, 1949. This agreement, as stated by Petitioners, consists of:

(1) Respondents' knowledge of a contract by which it was contemplated that the permit to construct Station KCIJ would be transferred to Frequency Broadcasting System in exchange for 500 shares of Frequency stock; and,

(2) Respondent's knowledge that this stock, when received by Southland, would be transferred to Petitioners individually; and,

(3) Respondent's payment for his stock upon the estimated value of Station WMRY. (Petition, 5).

It is Respondent's position that his acquiescence in or agreement to Petitioner's plan to benefit individually from the transfer of the construction permit to Frequency could not constitute a defense to this suit or support the affirmative relief sought by Petitioners.

The understanding was not that Petitioners would individually own Station KCIJ, but that Frequency Broadcasting System would own the station. Petitioners were to receive 500 shares of Frequency stock, one-third of its authorized capital. (R. 71-72). Respondent's wife owned rights in Frequency. (R. 155-156).

The transfer of the permit to Frequency never did take place. Petitioners caused Southland, over the protest and dissenting vote of Respondent, to withdraw its application to transfer the KCIJ permit. (R. 88-92). Consequently, Southland did not receive the 500 shares of Frequency stock which was the subject matter of Respondent's agreement.

This action took place about two years after Respondent purchased his Southland stock. Station KCIJ was no longer a mere construction permit. Instead, the station had by then been constructed and had commenced operations with funds advanced by Frequency Broadcasting System and its stockholders and by use of the credit of both Frequency and Southland. (R. 72-73, 77-78, 446-502).

This action took place because it had become evident in September, 1951, that the Federal Communications Commission would not approve the transfer of the KCIJ per-

mit to Frequency. The stockholders of Southland were, therefore, faced with the problem that Southland, and not Frequency, would have to discharge the debts incurred for the construction and operation of Station KCIJ. These amounted to approximately $120,000.00. (R. 456). The current liabilities of the station then exceeded its assets by a considerable amount. (R. 333). Station KCIJ was being operated at a loss. (R. 240).

Prior to such stockholders meeting of September 25, 1951, Station KCIJ had been managed by Frequency, and the individual Petitioners had not contributed funds or credit toward the financing of the station or the payment of its operating losses. In order to obtain funds for Southland to take over the station, the Petitioners agreed to personally endorse Southland's obligations in the sum of $13,300.00 if Respondent would loan the sum of $4,000.00 to Southland and would pay the sum of $9,300.00 into the treasury of Southland if such amount were needed upon the granting of a license to Southland to operate Station KCIJ. If such sum of $9,300.00 were not needed by Southland, it was to be deducted from Respondent's dividends. (R. 93-123). In November, 1951, Respondent agreed in writing to make such loan and payment. (R. 122).

In late November, or early December, of 1951, Petitioner Kamin asked Respondent if he was ready to put up such sum of money, and Respondent told him "No". (R. 113). Petitioner Goldberg then advised Respondent in writing that Respondent owned no interest in Station KCIJ. (R. 116). Respondent thereupon employed his present legal counsel. (R. 123).

Although Petitioners now assert that they, and not Southland, own, and always have owned, the equitable title to the KCIJ construction permit and, later, to the station, it-

self, they did not assume the payment of the obligations attributable to Station KCIJ. Instead, Petitioners, as Southland's officers and directors, caused Southland to advance its funds for the benefit of Station KCIJ. This practice was begun about November, 1951, when the transfer application was withdrawn, and it was continued at least through the years 1952 and 1953. Southland's books showed a balance of $36,443.24 due the corporation on November, 1953, for advances to Station KCIJ. (R. 531-533; 261).

Despite the precarious financial condition of Southland; despite the corporation's by-laws, and the mutual agreement of all stockholders in 1951; and despite the absence of valid corporate action, the Petitioners have caused Southland to pay to them, as salary and bonus for the years 1952 and 1953, sums totalling $57,600.00. (R. 440; 104-105; 135-136; 585; 142; 144; 586).

Respondent has received no salary, bonus or dividends from Southland or any of its stations. (R. 137).

Summary of the Argument

The record, including the pleadings, evidence, and proceedings at the trial, supports the holding of the Court of Appeals and shows that the case was fully developed as to the material facts on the controlling issue and that there is no substantial dispute of fact.

Argument

Petitioners argue that the Court of Appeals has denied them due process of law because it has decided the case on the basis of the record before it, and has reversed the trial court judgment and remanded the cause for further

proceedings not inconsistent with its opinion. (Petition 8, 9). Petitioners base this claim on the fact that the trial court judgment was rendered on Petitioners' motion made at the conclusion of Plaintiff's evidence. (Petition 9). They assert that they had no opportunity to put on their evidence (Petition 9), and that the basic question of whether they individually are the beneficial owners of Station KCIJ has been determined against them by the Court of Appeals. Petition 10).

I.

Petitioners have not shown grounds which might require the Court of Appeals to instruct the District Court to reopen the evidence on any material question decided by the Court of Appeals.

Neither in their motion for rehearing to the Court of Appeals, nor in their Petition in this Court, do Petitioners state that at another hearing they would be able to produce evidence which would contradict any part of the record already made or which would add to such record anything material not already covered thereby. There is no rule of law or procedure that we know of that absolutely requires an appellate court, upon reversing the District Court in an equity case tried to the Court, to remand the cause with instructions that the trial court upon a retrial is not "bound by the holdings of the Court of Appeals as being the law of the case". (See Petition, bottom p. 13). Nor do we understand that the Court of Appeals is under a duty "to instruct the trial court to hear defendant's evidence". (Petition 13). Instead, we think that if Petitioners have available any material evidence which they did not offer, and if they seek such instructions, the burden should be on them to point out to the Court of Appeals the nature

of the additional evidence which they reasonably could expect to offer and that such evidence might change the result.

As is hereinafter pointed out in this argument, we think that the facts material to a final determination of Petitioners' claim of beneficial ownership of Station KCIJ were fully developed in the hearing below, and that the Court of Appeals was clearly correct in its holdings on the merits.

II.

The evidence material to determination of the beneficial ownership of Station KCIJ was fully developed, and Petitioners have heretofore so treated it.

This is not the case of a dismissal under Rule 41(b) for failure of the plaintiff to show a right to relief. In this case, the District Court rendered a judgment for Petitioners and against Respondent on the ground that Respondent's prima facie right to relief had been overcome by Petitioners' affirmative defense, as shown by the undisputed evidence. Respondent's prima facie right to relief was shown by Petitioners' admission that legal title to Station KCIJ was in Southland and that they intended to transfer such station to themselves. Respondent's evidence also revealed the transactions which Petitioners alleged vested beneficial ownership of Station KCIJ in themselves as against the corporation (R. 21-41).

At the conclusion of the evidence offered by Respondent, Petitioners evidently thought that the facts pertinent to their affirmative defense and to their cross-action for a declaratory judgment had been fully developed, for they moved for a judgment (R. 662-663). This was not a mere

procedural gambit. Instead, it was the final move which Petitioners had planned before the trial commenced. They took the position before the trial that there was no dispute as to the facts and that the Respondent's testimony would put him out of Court. (R. 45).

In moving for judgment at this stage of the proceedings and under the circumstances of this case, Petitioners necessarily took the position that the facts established by Respondent's evidence with regard to the ownership of KCIJ were the same facts which Petitioners expected to offer in support of their affirmative defense and cross-action.

There was no dispute as to these facts, and they are fully developed. As the District Court stated in the Findings of Fact and Conclusions of Law (R. 669):

> **"The background facts, and for that matter, the ultimate facts, are largely if not entirely undisputed."**

In Petitioners' brief in the Court of Appeals, they adopted the Findings of Fact of the trial court as their statement of the case. (Appellees' brief p. 4). Such brief throughout treats the facts as having been fully developed so far as their claim of beneficial ownership of Station KCIJ is concerned.

As already pointed out, in their Motion for Rehearing to the Court of Appeals, Petitioners did not represent that they would, at another hearing, be able to offer evidence that would contradict or add to the evidence on this issue.

Whatever might be the appropriate rule in some other case, we do not think it was requisite, under the record in this case, for the Court of Appeals to give any further instructions to the District Court as to the proceedings upon remand.

It has not been the practice of this Honorable Court to remand a case upon the mere chance that a party may be able to furnish evidence which it failed to furnish at a previous trial. And this is particularly true when the evidence would be material only to a claim which the Court finds to be inequitable. *American Propeller & Mfg. Co. v. U. S.*, 300 U.S. 475, 81 L. Ed. 751 (1937).

And this Court has also held that a case will not be remanded for the introduction of the evidence which a party failed to introduce because of his misconception of the nature of the issues formed by the pleadings. In *Bowerman v. Hamner*, 250 U.S. 504, 63 L. Ed. 1113 (1919), this Court held that a suit in which one of the defendants against whom a bill had been dismissed by the Trial Court, and who had not introduced evidence in his defense because of his erroneous construction of the cause of action asserted against him, was not entitled to have the case remanded to the Trial Court upon the issue of his liability, *vel non*, and affirmed the judgment of the Court of Appeals which directed the Trial Court only to ascertain the amount of the judgment to be entered against him. See *McCormick v. King, et al.*, 241 Fed. 737 (Ninth Cir. 1917), at page 746. In this connection the Court said:

> "At his peril the appellant put the construction on the pleading which, for the reasons stated in this opinion, was erroneous. The suit was in equity, and he was charged with notice that the decision of the Trial Court was subject to review on both the law and the facts; and, although he was present in court during the trial, he neither took the stand to testify in his own behalf nor offered any evidence upon the question of his liability." (250 U.S. at 514).

In this cause there is neither an assertion that these petitioners failed to offer any evidence because of any misconception of the issues involved, nor is there even an assertion that petitioners can or will offer any other or additional evidence.

III.

The Court of Appeals was clearly correct in holding that beneficial ownership of Station KCIJ was not vested in the individual Petitioners.

Petitioners argue that the Court of Appeals erred in holding that they were not beneficial owners of Station KCIJ. At page 15 of their Petition to this Court, they argue in effect that the evidence was sufficient to establish their affirmative defense and their right to a declaratory judgment.

In determining the merits of Petitioners' argument, it should be remembered that the testimony was without substantial dispute. Therefore, it could not be said that the trial court possessed any advantage in appraising the significance of conflicting testimony. It should also be remembered that this was an action in equity and, of course, was tried without a jury. As we understand the rule, the Court of Appeals in such cases has the right to review the whole record. For the above reasons, the authorities cited by Petitioners at pages 14 and 15 are not, we believe, in point.

Further, it could not, we believe, be said that the finding of beneficial ownership in Petitioners to the disputed station is a finding of fact within the meaning of Rule 52a of the *Federal Rules of Civil Procedure*. Instead, it is the ultimate conclusion to be drawn from the undisputed facts

and, as such, is a conclusion of law or a mixed conclusion of law and fact. The Court of Appeals, we are certain, is presumed to be at least as competent to draw this ultimate conclusion as the District Court. We do not believe that it was the purpose of Rule 52a to circumscribe the power of the Court of Appeals to draw from facts established without dispute the ultimate conclusion in this or any other case.

It is admitted and undisputed that the individual petitioners were the officers, directors and controlling stockholders at all times material to this action except during that period of time when Respondent was also an officer and director, although obviously an ineffective minority. Petitioners' claims to the beneficial ownership of Station KCIJ are based entirely upon their actions as such officers, Board of Directors and controlling stockholders. These actions of Petitioners in their official capacity, as officers, directors and majority stockholders, must be examined in the light of the rules laid down by our Courts to define the duties, rights and liabilities of persons in that position.

One of the leading Texas cases in this field is *Scott v. Farmers & Merchants Natl. Bank*, 97 Tex. 31, 75 S.W. 7 (1903). In that case one J. W. Hobson was president and director of Waco Electric Railway & Light Company and the owner of almost all stock in the company. In consideration of their contract by which the Railway Company had agreed to run its line over certain property, the owners of that property donated four blocks of lots to the corporation, but the deed to these lots was made to Hobson. The track built in compliance with the contract was financed by money advanced or loaned by Hobson to the Railway Company. Hobson was not being paid any remuneration for

his services to the corporation. This contract was made with the consent of the directors. Hobson attempted to bolster his claim to the title of the four lots by approving a contract to finance the building of the railway. By this contract Hobson was to furnish the money for the building of the railway and the light plant and was to manage the construction without charge for his time. The bounties (including the four blocks of lots in question) acquired by the company as an inducement for the building of the railway were to be conveyed to either Hobson or the other party to the contract for the use of the company. The other party to the contract failed to pay to the corporation the entire amount which he had agreed to pay and was subsequently released by Hobson from his contract.

The Supreme Court of Texas held that the lots taken by Hobson in his name were held for the benefit of the corporation. The contract for the financing of the railway was held to be immaterial to the right of Hobson to hold these lots for his own benefit. The Court remarked that under the contract for the financing of the land it was very clear that Hobson could not have claimed the land as his own, and while he attempted to show that the contract was changed by a subsequent agreement between himself and the other contracting party, it was not shown that the change was made before the land was conveyed to him. The Court further remarked:

> "But leaving that contract wholly out of view, we fail to see how, under the facts of this case, Hobson could claim the property as his own, in the absence of some corporate action on the part of the company which authorized him to take a conveyance of the property for his own use. If, without salary or other compensation, he rendered services in the advancement of the enterprise, and if he furnished his own money to con-

> struct the road, this may have entitled him to compensation by the company, but it did not entitle him to take and hold the property of the corporation as his own, unless authorized to do so by the corporation itself. We, therefore, conclude that when the four blocks of lots were conveyed by the University Land Investment Company to Hobson, he held them in trust for the Electric Company." (75 S.W. at 13).

Similar holdings are found in *Milam v. Cooper Co., Inc., et al.*, 258 S.W. 2d 953 (Tex. Civ. App., 1953, Writ of Error Ref., N.R.E.) and *Dunagan v. Busbey*, 152 Tex. 630, 263 S.W. 2d 148 (1953).

Had these Petitioners taken title to the assets comprising Radio Station KCIJ in their own names (disregarding for a moment that such action would have been prevented by the Federal Communications Commission), we believe that the Court would have decreed that such assets were held by Petitioners for the benefit of Southland Broadcasting Company and would have ordered that they be restored to the Company or that Petitioners account to Southland for the benefits received by them through such transaction. *Guth v. Loft, Inc.*, 5 Atl. 2d 503 (Del. Sup., 1939). We believe that the Court in the *Guth* case correctly stated the applicable rule, which is also the rule in Texas, when it said:

> "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge,

but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.

"If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty." (5 A. 2d at 510).

Reply to Petitioners' Argument

As support for their argument that the Court of Appeals erred in its holding with regard to the beneficial ownership of Station KCIJ, Petitioners set forth, at pages 15-17, six numbered paragraphs which they assert show error on the part of the Court of Appeals. We will reply in similar form:

1. The fact that the purchase price of Respondent's stock was calculated on the basis of the value of Station WMRY, alone, would not, contrary to Petitioners' assertion, give Respondent a windfall.

The reason, of course, that the purchase price of Respondent's stock in Southland was calculated on the basis of the value of Station WMRY, alone, was that at the time of such purchase, in November, 1949, Petitioners as well as Respondent thought that Station KCIJ would be beneficially owned by Frequency Broadcasting System. Respondent, through his wife, expected to be a shareholder in Frequency.

Respondent did not expect that Southland would be compelled by unexpected events to take over and discharge the accrued construction and operating costs attributable to Station KCIJ.

For the almost seven years since 1949, Respondent has received nothing from the $13,300.00 he invested in Southland. Instead the revenues received by Southland from the operation of Station WMRY have been used for the benefit of, and to sustain, Station KCIJ, and in salaries and bonuses to Petitioners, not for expansion of the assets of Station WMRY or in dividends to Southland stockholders.

As soon as Station KCIJ began making money, Petitioners began to withdraw funds from Southland in the form of salaries and bonuses to themselves.

Although it was money borrowed on Southland's notes and money contributed by Southland which sustained KCIJ during the period when it could not sustain itself, and although Petitioners have not invested any of their money in Station KCIJ, they, nevertheless, claim to be the sole beneficial owners of such station.

It is obvious, we think, that the windfall is being sought by Petitioners and not by Respondent.

2. Respondent's admission that he knew he was buying an interest in WMRY, only, when he purchased Southland stock in November, 1949, cannot be taken as an admission that Southland was not the beneficial owner of Station KCIJ.

The undisputed facts establish that none of the parties in 1949 anticipated that Southland would remain the owner of the KCIJ construction permit or that Southland would pay the costs of constructing and operating such station and the wind up with full ownership of the completed station. Yet, that is precisely what happened. Respondent's expectations in November, 1949, could not be material or controlling in view of the subsequent events which were not within the contemplation of any of the parties.

3. Respondent does not dispute that he was told that the 500 shares of Frequency stock which Southland expected to receive for transfer of the KCIJ construction permit was to be the property of the individual Petitioners. Since the contract upon which such claimed right was based was subsequently caused to be abrogated by the individual Petitioners, over Respondent's protest, Respondent does not believe that Petitioners are any longer entitled to any rights or benefits which they might have expected to receive under such abrogated contract.

Further, it should be remembered that Respondent, himself, was interested that the contract not be abrogated. He wanted Southland and its Station WMRY not to be obligated for KCIJ's debts, so that he could receive revenues from WMRY. He also expected to benefit from Frequency's

ownership of Station KCIJ if such venture turned out to be profitable, while not jeopardizing his Southland investment if KCIJ were not profitable.

It would be inequitable in truth to allow Petitioners, through their stock ownership in Southland, to derive benefits from the situation as it developed as a result of the abrogation of the contract and their use of Southland's funds and to add thereto the benefits which Petitioners could no longer receive because of such abrogation.

4. The argument based on Respondent's admission that Southland was to end up with WMRY only has, we believe, been fully covered by the above. With regard to the rights of the individual parties based upon what they paid for their stock, Respondent's argument is not that he paid more for his stock than did Petitioners, but that it was his capital that made it possible to construct WMRY, and that it was the operation of WMRY that made it possible, two years later, for Southland to take over Station KCIJ, pay its current obligations, and operate it until it became a going concern.

When, in November, 1949, Respondent paid Southland $13,300.00 for his 399 shares of stock, Petitioner Goldberg had paid in only $400.00 for his stock; Petitioner Kamin, $750.00; and Petitioner Coon, nothing (R. 488-489). Southland had no capital and could not construct either station. Southland used the money paid in by Respondent in the construction of Station WMRY. Only after such station had gone into operation did Petitioners pay any additional money into Southland's capital account, such payment totalling $4,938.00 (R. 233). For such additional payment, Petitioners received additional Southland stock sufficient to give them control of the corporation (R. 523). When, in September, 1951, it was anticipated that South-

land would need additional capital in order to take over the operation of Station KCIJ, Petitioners did not offer to contribute any additional capital but merely to endorse Southland's note for $13,300.00. They refused to permit Respondent to do likewise.

Instead, they called upon Respondent to make an additional contribution to the capital and to make a loan directly to the corporation. When he subsequently refused so to do, Petitioners informed Respondent that he owned no interest in Station KCIJ. Despite such declaration, Petitioners continued for two years thereafter to use Southland's funds and credit for the benefit of, and to support, Station KCIJ. These acts, we believe, speak for themselves.

5. It is true that at the stockholders' meeting of September 25, 1951, Respondent did not verbally protest Petitioners' action in claiming that he had no interest in KCIJ and in providing by resolution that Respondent would make a contribution to Southland capital. Petitioners' representation as to the effect of the resolution is erroneous, however. Such resolution does not recite that KCIJ was not a Southland asset or that Respondent agreed to make a contribution in consideration of Petitioners' allowing Southland to reacquire the beneficial title to KCIJ. Instead, such resolution recites:

> "WHEREAS, if the FCC permits the withdrawal of the application and grants KCIJ its license, Southland Broadcasting Company will remain the owner of two stations. . . ." (R. 93)

Such resolution further recites that the consideration for Respondent's agreement to make a contribution to capital was the agreement of Petitioners to personally endorse a corporate loan in the sum of $13,300.00. (R. 94). Respond-

ent voted against the resolution which provided that if he declined to make such additional payment, the individual Petitioners should transfer KCIJ to a new corporation which they might organize. (R. 103).

We believe that the Court should further consider the fact that two of the Petitioners who represented to Respondent that he owned no interest in KCIJ were attorneys. In view of their position as controlling stockholders and their superior knowledge of the law, could Respondent now be estopped to assert his rights?

Whatever might have been the right of Petitioners in November, 1951, to assume the debts of Station KCIJ and transfer it to themselves, KCIJ being then in straightened circumstances and a burden to Southland, such right no longer existed in February, 1953, when Petitioners voted to make such transfer. Both KCIJ and Southland were then solvent. Instead of having acted at the time when drastic action might have been justified in an effort to save the corporation from bankruptcy, Petitioners waited until after KCIJ had been put on its feet and had become a valuable asset of Southland before they attempted to transfer the station to themselves. Whatever may be the powers of officers and directors of a corporation to take drastic action in extreme circumstances, such power does not survive the extremity. Therefore, no rights could exist in Petitioners to make the transfer in 1953 by virtue of the resolutions passed in September, 1951, when the circumstances had materially changed and the conditions which alone might justify such resolutions no longer existed.

6. The so-called "secret" feelings of Respondent in September, 1951, that, if the transfer of KCIJ to Frequency did not go through, Southland would have to support KCIJ were evidently also the feelings of Petitioners at such time

and for some years thereafter. The resolutions at the stockholders meeting of September 25, 1951, for which all Petitioners voted, recognized such fact.

Any breach by Respondent of his agreement to make a loan to Southland and to contribute additional capital if the same were needed in connection with KCIJ's operations would not justify Petitioners' actions and claims. This they, themselves, recognized when in December, 1951, they used Southland's funds for the support of KCIJ. As hereinbefore stated, the practice of using Southland's funds for such purpose continued at least into February, 1953, the month in which Petitioners took corporate action to effect the transfer of Station KCIJ to themselves. In such month, Southland's records showed an outstanding balance on the inter-station account in favor of WMRY in the amount of approximately $28,000.00. If Petitioners are now willing to recognize that Station KCIJ is properly an asset of Southland, Respondent would truly have no justification to complain of such advances. However, for Petitioners to have extracted Southland's money for the benefit of a station to which they claim the sole beneficial interest and at a time when it was doubtful whether such station would become a paying asset is, we think, a plain breach of the duties which Petitioners owed to Southland by virtue of their positions as officers and directors of the company.

Contrary to Petitioners' statement appearing at the bottom of Page 17 of the Petition, Respondent does not claim that the mere making of advances by Southland changed the title to the assets of KCIJ. Respondent says, instead, that after the contract with Frequency was abrogated, Southland was the legal and equitable owner of Station KCIJ, and that the advances should be conclusive of Petitioners' recognition of this fact.

Nor does Respondent admit that the construction permit was ever the property of the individual Petitioners. Under the law, it could not have been, since it could not have been transferred out of Southland without the approval of the Federal Communications Commission. Nor was any such transfer attempted. Instead, the only transfer of the construction permit ever contemplated was the transfer to Frequency, which, as the Court already knows, was withdrawn after some two years and after Frequency had constructed the station and placed it in operation.

7. The foregoing likewise applies to the contention made at Page 18 in numbered Paragraph 7. Respondent does not contend that the construction permit should be treated separately from the physical assets connected with Station KCIJ, nor does he admit that such construction permit was ever owned by the individual Petitioners.

Petitioners' argument, that the agreement between themselves and Respondent constituted Southland a trustee of KCIJ for the benefit of the individual Petitioners, is an unusual application of the trust theory in this type of a case. Not only does the record fail to substantiate Petitioners' assertion that the original understanding between themselves and Respondent created such a trust; but the only trust which could arise would be for the benefit of Southland, not Petitioners, who were Southland's officers and directors.

Southland is therefore entitled to follow its funds through these trustees into the assets which now comprise Station KCIJ. Petitioners, as fiduciaries, could not be entitled to derive any personal benefit from their administration of this trust, nor could they claim any title adverse to Southland.

8. In Paragraph 8, at Page 19, Petitioners state what seems to us to be the boldest position we have ever seen in a case of this nature. They admit that at the stockholders' meeting in September, 1951, they, the controlling stockholders, told Respondent that they were going to obtain credit for KCIJ's operations through their personal guarantees. When Respondent, reasonably we think, suggested that he be permitted to make his contribution in the same manner, Petitioners did not agree. Instead, they told him that he had no interest in KCIJ, and would have to first buy an interest. It will be recalled that all the parties at such meeting knew that Southland's credit was committed on the KCIJ debts and that these debts would have to be paid in order to protect Respondent's investment in Southland. It will also be recalled that two of the Petitioners were attorneys. Petitioners representation to Respondent that Southland owned no interest in KCIJ was not true then, and is not true today.

It is against this background that the Court should consider the written agreement of Respondent. Petitioners assert that such agreement constitutes "a conclusive admission that Respondent was agreeing to purchase something that he did not then own." We say that such written agreement should not be so construed, and that if it was valid under the circumstances, it created, at the most, a contract between Southland and Respondent to loan certain funds to Southland and to make a contribution to the capital account "if needed". If not needed, the sum was to be deducted from Respondent's dividends (R. 122). Certainly such agreement did not constitute a transfer to Petitioners of any rights of Respondent in Southland or in KCIJ, nor was it so intended. If Petitioners then thought, as they now assert, that Station KCIJ was not the property of South-

land, they certainly, in their subsequent conduct of the affairs of Southland, abused their powers as the officers and directors of Southland.

9. The threat of Petitioner Kamin that he would see that Respondent "never got a dime out of it" does not require an explanation. Its meaning is clear in the light of the subsequent actions of Petitioners. Respondent has never received "a dime out of it," whereas Petitioners have taken for themselves at least $57,000.00 of the corporate funds as salaries and bonuses although the stations were in fact managed by employees, each of whom received a salary of $1,000.00 a month, or more.

In answer to argument made at Page 21 of the Petition, we reiterate that the record does not support Petitioners' oft-repeated assertion that Respondent at any time had agreed that KCIJ would be beneficially owned by the individual Petitioners. Nowhere in the Petition is a record reference cited for this assertion. Such assertion is contrary to all of the reasonable inferences from the undisputed facts and is at variance with the testimony of both Respondent and Petitioner Goldberg as to the nature of Respondent's agreement.

Nor is the result of the Court of Appeals' opinion inequitable. Respondent does not thereby acquire an interest in Station KCIJ for nothing. It is Southland that retains Station KCIJ. This is equitable because the physical assets were acquired in Southland's name, and in part, at least, on Southland's credit, and it was Southland's earnings which paid for the station. Although Petitioners assert that the entire value of the station was created by their efforts and individual credit, the record, including the

references which they give, shows only that Petitioners guaranteed certain loans for which Southland was the primary obligor. Respondent had offered to do the same, and had been refused.

Conclusion

The foregoing brief in opposition is based upon what Respondent believes are elementary rules of law governing corporate affairs. We think that the undisputed facts require the result reached by the Court of Appeals and that extensive citation of authority in support of the opinion of the Court of Appeals is therefore unnecessary. We feel that this Court will be convinced, upon consideration of the facts, that the Court of Appeals was clearly correct in its holdings and that Petitioners have not been deprived of any rights.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

C. E. BRYSON

Counsel for Respondent

Of Counsel:

B. JEFF CRANE

BEN H. RICE, III

August, 1956

Certificate of Service

I, C. E. BRYSON, one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1956, I served a copy of the foregoing Brief for Respondent in Opposition to Petition for Writ of Certiorari on each adverse party, to-wit: Southland Broadcasting Company, Lester Kamin, Billy B. Goldberg, and Pat Coon, Petitioners, by depositing such brief in a United States mail box, with first class postage prepaid, addressed to Pat Coon, Counsel of Record for all Petitioners, at his postoffice address, 1900 Adolphus Tower, Dallas, Texas.

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